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Westerheyde v. INS, No. 02-70372
Ferguson, Circuit Judge, dissenting.

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U.S. COURT OF APPEALS

I respectfully dissent. The majority holds that the repeated death threats received by Herman Enrique Westerheyde “are insufficient to support an objectively reasonable fear of future persecution.” Maj. Op. at 4 (quoting *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000)). This holding directly conflicts with the law in this Circuit, which clearly instructs that multiple death threats, even when not accompanied by open confrontation or physical harm, are sufficient to show a reasonable fear of future persecution. *See Lim*, 224 F.3d at 935. A petitioner need not wait until there has been an execution in order to establish a reasonable fear of persecution. Because the evidence that Westerheyde introduced is sufficient to find that his fear of persecution if returned to Guatemala is objectively reasonable, I dissent.

In 1988, Westerhyde joined a government opposition party in Guatemala, the Christian Democrats. In 1990, he campaigned on behalf of the Christian Democrats’ candidate for the presidency and ran for local office as a member of that party. In 1991, four months after he and the other candidates lost the election, the major Christian Democrat leaders in Westerhyde’s hometown, including Westerhyde, received a death threat at their party headquarters. The letter listed Westerhyde explicitly, stating that he and three others were guilty of corruption

for supporting the Christian Democrats and that they were going to be “eliminated.” Two months later, Westerheyde and his political colleagues received another letter stating the same thing. Westerheyde testified that he believed both letters were sent by government death squads.

First, it is important to note that the Immigration Judge (“IJ”) found Westerheyde credible and accepted his testimony. In other words, the IJ believed Westerheyde was telling the truth about the nature of his persecution. “Because the immigration judge is in the best position to evaluate an alien’s testimony, his or her credibility determinations are to be given ‘much weight.’” *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985) (quoting *Phinpathya v. INS*, 673 F.2d 1013, 1019 (9th Cir. 1981), *rev’d on other grounds*, 464 U.S. 183 (1984)).

Second, the facts adduced by Westerheyde clearly support his contention that he has a well-founded fear of future persecution. “To effect a well-founded fear, a threat need not be statistically more than fifty-percent likely; . . . even a one-tenth possibility of persecution might effect a well-founded fear.” *Lim*, 224 F.3d at 934 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987)). In *Lim*, as in this case, the petitioner received death threats and was placed on a “death list” as a result of his political activities. *See id.* at 935. We found the petitioner established a well-founded fear of future persecution. *Id.* Similarly, in *Cardenas*

v. INS, we held that repeated death threats to a petitioner were sufficient to support a reasonable fear of future persecution. *Cardenas v. INS*, 294 F.3d 1062, 1064, 1067 (9th Cir. 2002).

The majority distinguishes *Lim* on the basis that, in *Lim*, the petitioner presented evidence that he was followed and his colleagues were murdered.¹ Maj. Op. at 4. However, our law is clear that a petitioner does not actually have to wait for his family or co-activists to be murdered, or until harm is literally right around the corner, in order to qualify for asylum. Death threats alone are sufficient. *See Briones v. INS*, 175 F.3d 727, 728 (9th Cir. 1998) (presuming testimony was credible, evidence of single letter listing petitioner on political death list sufficient to show *past* persecution); *see also Lim*, 224 F. 3d at 936 (collecting cases on well-founded fear on the basis of threats alone).

The majority appears to conflate the test for fear of future persecution, which requires only that the fear “be both subjectively genuine and objectively reasonable,” *Lim*, 224 F.3d at 934 (*citing Cardoza-Fonseca*, 480 U.S. at 430-31), with that of the test for past persecution, which sets a much more stringent standard for threats. As we explained in *Lim*, “[o]ur court generally treats

¹The majority also asserts that the facts of *Lim* are distinguishable because *Lim* was placed on a “death list.” *Id.* However, it is clear from the record that Westerheyde was also placed on a death list.

unfulfilled threats, without more, as within that category of conduct indicative of a danger of future persecution, rather than as past persecution[.]” *See Lim*, 224 F.3d at 936 (collecting cases). By contrast, “[t]hreats standing alone . . . constitute past persecution . . . when the threats are so menacing as to cause significant actual ‘suffering or harm.’” *Id.* (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). The majority’s holding, which implicitly requires actual death or immediate menacing before a petitioner can make a showing of a well-founded fear, fundamentally misconstrues the requirements for cases alleging fear of future persecution. The majority points to no caselaw which supports its position, as the Supreme Court has explicitly rejected such a heightened standard. *See Cardoza-Fonseca*, 480 U.S. at 449 (“to show a ‘well-founded fear of persecution,’ an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country.”).

In this case, Westerheyde’s fear is both subjectively genuine and objectively reasonable. Westerheyde has clearly demonstrated well-founded facts which entitle him to asylum relief. I therefore dissent.